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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1944

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STANLEY JOHN FLAKOWICZ, *Petitioner*

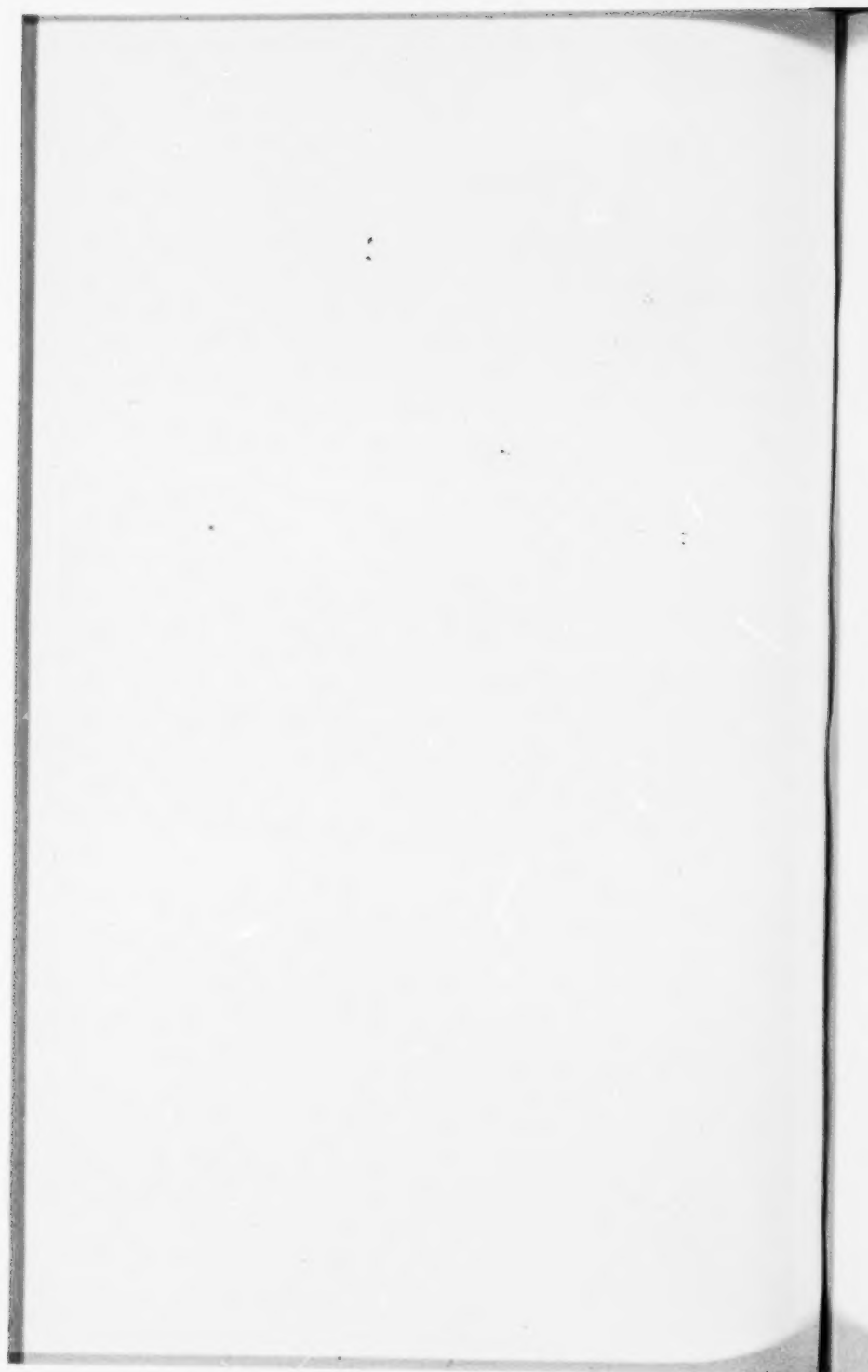
v.

UNITED STATES OF AMERICA, *Respondent*

■
**Petition for Writ of Certiorari to the
United States Circuit Court of Appeals for
the Second Circuit**

HAYDEN C. COVINGTON

Attorney for Petitioner



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SUPREME COURT OF THE UNITED STATES

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STANLEY JOHN FLAKOWICZ, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

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**Petition for Writ of Certiorari to the
United States Circuit Court of Appeals for
the Second Circuit**

TO THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Stanley John Flakowicz, presents this his petition for writ of certiorari and shows unto the Court as follows:

Summary of Matters Involved

1. Preliminary Statement.

The questions presented by this petition upon the issues raised in the courts below have neither been decided nor foreclosed by the decision in *Falbo v. United States*, 320 U. S. 549. Indeed the dictum in *Billings v. Truesdell*, 321 U. S. 542, 558-559 supports the substantial question here presented, namely, whether petitioner, who has completed the selective process by acceptance on a preinduction physical examination and who is charged by indictment with refusal to report for induction into the armed forces pursuant to the Selective Training and Service Act may show, in defense to the indictment, that the orders on which the charges are based are void, illegal and contrary to law. If the Act and the Regulations are construed so as to require a registrant, who is exempt from all training and service, to report for induction as a condition precedent for

obtaining judicial review of the illegality of the administrative orders, that the Act and Regulations are unconstitutional. None of these issues were presented in the *Falbo* case. Furthermore, the facts in this case are entirely different. Here the petitioner has completely exhausted all administrative remedies by acceptance following his pre-induction physical examination by the armed forces.

2. *Opinion of Court Below.*

The opinion of the United States Circuit Court of Appeals is not yet reported in the Federal Reporter. It appears in the record certified to this Court. (178)¹

3. *Statutory Provisions Sustaining Jurisdiction.*

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

4. *Timeliness of this Petition.*

The decision of the Circuit Court of Appeals was entered on January 22, 1945. (178) Upon application timely made the time for filing a petition for rehearing was enlarged. Within such time a petition for rehearing was duly filed. (181) The petition was denied on February 19, 1945. (182) The judgment of the court below became final on February 19, 1945. (183)

5. *Statutes and Regulations Involved.*

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended, (50 U. S. C., Appendix ss. 301-318) are drawn in question here, together with Sections 601.5, 622.44, 623.1, 623.2, 623.21, 623.61, 625.1, 625.2, 626.1, 627.12, 629.1-629.35, 633.2, 633.21, 642.41 and

¹ Figures appearing in parentheses throughout this petition and the supporting brief refer to pages of the printed transcript of the record on appeal.

642.42 of the Selective Service Regulations² (32 C. F. R. Supp., 601.5 et seq.) promulgated by the President under said Act.

6. *Constitutional Provisions Involved.*

Clause 3 of Section 9 of Article I prohibiting enactment of bills of attainder. Clauses 1 to 3 of Section 2 of Article III investing the judicial powers. The Fifth and Sixth Amendments guaranteeing the rights of defendants in criminal prosecutions and securing due process of law.

7. *Questions Presented.*

(1) Does reporting at the induction station pursuant to an order and acceptance upon a preinduction physical examination before being ordered to report for induction finish the selective process and constitute exhaustion of the administrative remedies so as to qualify defendant for defenses to an indictment charging petitioner with failure to report for induction as ordered, on grounds that the order is illegal?

(2) May the petitioner, who is a minister of religion under Section 5 (d) of the Act, thus exempt from all training and service of any kind under the Act, show in defense to the indictment that the administrative agency acted arbitrarily and capriciously, in excess of its authority or jurisdiction, contrary to substantial evidence, without any evidence, contrary to the Act and Regulations, and in violation of petitioner's rights guaranteed by the due process clause of the Fifth Amendment to the United States Constitution?

(3) Does the record show that the administrative agency violated the substantive rights of petitioner as an exempt registrant, because there was no evidence before it showing that petitioner was not a minister of religion as established by him, contrary to the due process clause of the

² The Regulations are amended frequently. The sections are here set out as they existed when the facts in controversy took place.

Fifth Amendment to the United States Constitution, the Act and the Regulations?

(4) Does the record show that the administrative agency violated the procedural rights of petitioner contrary to the due process clause of the Fifth Amendment to the United States Constitution, the Act and Regulations, in changing petitioner's classification and by failing to consider the undisputed evidence before the agency showing that he was exempt from all training and service under the Act as a minister of religion?

(5) Did the administrative agency act arbitrarily and capriciously in classifying the petitioner as liable for training and service when there was no evidence to show that he was not a minister of religion as established by the record?

(6) Since the records before the administrative agency showed that petitioner's life and full time were devoted to preaching as a missionary evangelist of Jehovah's witnesses, a recognized religious organization, was petitioner exempt from all duty for training and service under the Act because a minister of religion within the meaning of the Act and the Regulations?

(7) Does the showing by petitioner before the administrative agency that he claimed exemption under Section 5 (d) of the Act, supported by substantial evidence, amount to a challenge to the jurisdiction or authority of the administrative agency so as to require a trial de novo in the district court as to whether the action of the agency is ultra vires?

(8) Since the Act and Regulations have been construed by the courts below so as to require the petitioner, who is exempt from all duty under the Act, to report for and submit to induction as a condition precedent to judicial review and so as to penalize petitioner by denying him the right to challenge the legality of the administrative action, are said Act and Regulations void because constituting a bill of pains and penalties contrary to the bill of attainder

clause of the United States Constitution, Clause 3, Section 9 of Article I?

(9) Since the Act and Regulations have been construed by the courts below so as to require the petitioner, who is exempt from all duty under the Act, to report for and submit to induction as a condition precedent to judicial review and so as to penalize petitioner by denying him the right to challenge the legality of the administrative action, are said Act and Regulations void because denying petitioner his right to a judicial trial of his defense of no duty under the Act contrary to Article III, the due process clause of the Fifth Amendment and to the Sixth Amendment, United States Constitution?

(10) Did the trial court err in holding that petitioner could not challenge the invalidity of the administrative action in defense to the indictment, in excluding proffered evidence, in denying petitioner's motion to dismiss, in denying petitioner's motion for a judgment of acquittal and his requested instructions?

8. *Statement of the Case.*

HISTORY

This criminal action was begun by indictment returned against petitioner, Stanley John Flakowicz, in the United States District Court for the Eastern District of New York on March 8, 1944. (3, 5-6) Petitioner was charged with failing to perform a duty required of him under the Selective Training and Service Act of 1940 and the Regulations promulgated thereunder in that he "did unlawfully, wilfully and knowingly fail and neglect to report for such induction in the time and place fixed in said notice". (6)

Petitioner urged a motion to quash (7-8) which was denied. (12) Upon a plea of "not guilty" (3) a trial to a jury began on May 29, 1944, before the Honorable Clarence G. Galston, United States District Judge. (13) The evidence was concluded May 29, 1944. (39-40) At the close of all the

evidence, petitioner moved for a dismissal of the indictment, a judgment of acquittal and direction of a verdict of "not guilty" in which the reasons were stated extensively. (40-43) On denial thereof petitioner excepted. (43) At the close of all the evidence petitioner submitted to the court his requested charges. (67-97) Counsel for petitioner summed up the evidence. (43-53) Counsel for the Government summed up the evidence. (54-55) The court charged the jury. (55-61) Petitioner objected and excepted to the court's charge. (61-65) All of said requested charges were refused and exceptions allowed. (61, 67-97) The jury returned a verdict of "guilty". (65) On May 29, 1944, the court remanded petitioner to custody until imposition of sentence on June 8, 1944. (66) Thereupon petitioner was sentenced to three years and committed to the custody of the Attorney General in such place of confinement as may be designated. (4-5) On June 8, 1944, petitioner served and filed his written notice of appeal (4, 156-159) He timely filed his assignments of error which support each ground of this petition. (159-172)

The cause was submitted on January 16, 1945 to the court below for a decision, and on January 22, 1945 said court affirmed the judgment of conviction according to an opinion filed on that date. (178) The time for filing a petition for rehearing was duly enlarged by an order of the court. A petition for rehearing was timely filed. (181) It was denied on February 19, 1945. (182) An order for mandate on February 19, 1945 was entered, affirming the judgment of the district court. (183) On that date the judgment of affirmance became final.

STATEMENT OF FACTS

Stanley John Flakowicz registered with Local Board 252, Forest Hills, Queens County, Long Island, New York, on December 21, 1942. (16, 33) On January 12, 1943, the local board mailed him a Selective Service questionnaire (33, 98) which he properly filled out and returned showing

he was 18 years of age, had completed eight years of elementary school and four years of high school and for six years had attended the Watchtower divinity school in preparation for the ministry. (33, 98-99) He showed that he was working as an ordained minister of the gospel under direction of the Watchtower Bible & Tract Society, publishers for Jehovah's witnesses; that the kind of work he did was preaching the gospel of God's Kingdom, in which he had three and one-half years' experience, and to which he had devoted his full time since November 1, 1942, and that he had not been engaged in any other job. (99-100) He showed his usual occupation as an ordained minister and preferred his ministerial work and no other. (110) He acted as a regular unordained minister from 1939 to 1942. (28, 107) He stated he was a minister of religion, customarily served as a minister and had been formally ordained on June 12, 1942. (28-30, 100-101) While attending public schools he pursued his course in preparation for the ministry by attendance at classes of instruction held in the evenings. He began with this in 1936 and finished in June, 1942, at which time he was duly ordained. (26-27, 29-30, 106) The Watchtower Bible & Tract Society issued a certificate of ordination to him confirming his statement as to his ordination on June 12, 1942. (30, 35, 110-111) The ceremony of ordination was performed under the direction of the Watchtower Bible & Tract Society in the presence of many people. (29-30) He explained fully that his youthfulness did not disqualify him from acting as a minister of the gospel citing the cases of Timothy, Samuel, and Christ Jesus. (107-108) He cited the same authority for preaching—Isaiah 61:1, 2—as did Christ Jesus at Luke 4:17-19: "And there was delivered unto [Jesus] the book of the prophet Isaias. And when he had opened the book, he found the place where it was written, The Spirit of the Lord is upon me, because he hath anointed me to preach the gospel to the poor; he hath sent me to heal the brokenhearted, to preach deliverance to the captives, and recovering of sight

to the blind, to set at liberty them that are bruised, to preach the acceptable year of the Lord." (30, 109) He showed that he preached from house to house as an evangelist in the same manner as did Christ Jesus and His apostles. His purpose in doing this is to hunt out those people of good-will who desire more knowledge on the Bible and are willing for him to conduct Bible studies in their homes as a minister of the gospel. (30-32, 109) He also publicly preached upon the sidewalks by distribution of magazines containing Bible sermons. (31) As a minister of the gospel he was associated with the Jamaica congregation of Jehovah's witnesses, where he regularly delivered Bible sermons and discourses on Bible prophecies. (31, 109) The purpose of thus preaching to the people is stated by petitioner, to wit, to "familiarize other people with the truths of the Bible and to have them learn of the wondrous prophecies of Almighty God, such as the Kingdom of Almighty God that we pray for, and this Kingdom which shall be established on the earth, and it will be a righteous Kingdom and a righteous Government under the rule of Almighty God and Christ Jesus, and in this Government on the earth there will be no wars or rumors of wars, and there will be no pestilences or famines or earthquakes, or any of the pains or sorrows that we have today; and as the Scriptures say, 'God will wash away the tears from all eyes and there will be no more sorrow or pain.' 'Each person will build and inhabit his own home, and he will live under his own fig tree, and they will destroy all weapons of war;' and the Scriptures also state, 'The sword will be turned into a plowshare.' And 'neither will there be war any more, and this Government will be a righteous Government and exist forevermore'." (32) Petitioner's ultimate aim is to "comfort all that mourn", and not to cause trouble or oppose people on account of their religion or lack of belief. (32-33)

Petitioner claimed classification of IV-D. (101, 106-107, 109) Upon the evidence the local board classified him in Class IV-D, granting his exemption from all training

and service as an ordained minister on January 29, 1943. (21) The card advising him of this classification was received through the mail on February 3, 1943. (33)

On August 31, 1943, the local board received an *anonymous* letter stating that the petitioner falsely stated his claim, willfully took the name of the organization to dodge the draft and entered "pioneer" work after graduating from high school as a foundation for deferment, and complained about his exemption while other men were being drafted. (117) On September 27, 1943, he appeared before the local board for a hearing with reference to his classification at the request of the local board. (119, 122) On such date his classification was changed from IV-D to I-A. (22) On October 1, 1943, he received card notifying him of the change of classification. (34) At the time his classification was changed, there was no change in his status. At the time he was classified in IV-D as well as when he was placed in I-A, he was discharging his ministerial duties and devoting substantially his full time to the furtherance thereof. (34)

On October 5, 1943, the local board received a letter dated September 25, 1943, signed by Rose Boulette, stating that Flakowicz was eligible for the draft and had been 'pulling the wool over the board's eyes'. She complained about his having a IV-D classification and stated that he should be placed in I-A immediately and that if his classification were not changed she would report the matter to the Director, Lewis B. Hershey. (118)

On October 7, 1943, petitioner requested a personal appearance. (119-120) On October 13, 1943, he appeared before the local board (122-123) and filed additional evidence showing conclusively that he was entitled to Class IV-D and that the local board had no authority to change his classification. (120-122) On October 15, 1943, after the board continued his I-A classification, he filed his appeal. (122, 123) With his appeal, additional evidence was submitted proving his ministerial capacity, and answering the

charges against him filed with the local board. (122-132) With this additional statement were filed affidavits from John R. Anderson, Milton G. Henschel, M. G. Friend and T. G. Jewulski showing that the petitioner stood in the same relationship to Jehovah's witnesses as do the orthodox clergy in relation to their congregations as ministers of religion. (133-136) He also submitted a statement signed by seventy-four persons that he had been serving as a full-time minister as one of Jehovah's witnesses and that he performed functions and ceremonies normally performed by duly ordained ministers of other religions. (137) The board of appeal continued his I-A classification on November 1, 1943. (17, 36)

On November 15, 1943, Flakowicz duly requested the Director of Selective Service to review his classification. (138-139) On November 16, 1943, the Director of Selective Service suspended induction process (141-142), but thereafter refused to take an appeal in petitioner's behalf. (142-143) The file was returned to the local board. (143-144) The local board asked petitioner if he desired to be inducted as a conscientious objector (144-145) and petitioner answered that he claimed only classification as a minister and would not make the requested choice, but emphasized his sincere objection to military service. (145) On January 25, 1944, he wrote a letter to the President of the United States reviewing his controversy with the local board and requesting that a Presidential appeal be taken to avoid an injustice. (148-151) This letter was referred to the New York City Director of Selective Service, who answered it on February 2, 1944, declining to take further action. (151)

On January 27, 1944, petitioner was notified to appear for preinduction physical examination on January 31, 1944. (18, 146-148) He complied and was found acceptable by the army for general military service. (18, 102-103) Thereafter the local board advised him he had been found acceptable. (38)

On February 19, 1944 he renewed his appeal to the President for relief (152-154), but his letter was once more referred to the New York City Director of Selective Service, who again declined to take action for the reasons stated in his previous letter of February 2, 1944. (155)

On February 25, 1944, the local board notified petitioner to report for induction at 7:15 a.m. March 8, 1944. (103-104) On March 7, 1944, he wrote the local board acknowledging receipt of the order, refusing his claim for exemption, and charged the board with violating the law and stated that he owed no duty to report because the board had exceeded its authority. (105) Petitioner refused and failed to report for induction because he believed he was exempt as a minister of religion, that the board arbitrarily and capriciously classified him, exceeded its authority and violated the Act and Regulations. Since he had been accepted for duty he believed the administrative process had been completed so as to entitle him to challenge in court the legality of the classification. (38-39)

Thereafter petitioner was arrested, indicted, tried and convicted for an alleged violation of the Selective Training and Service Act.

ISSUES INVOLVED, AND HOW RAISED

By motion to quash, petitioner claimed that the administrative process had been sufficiently completed so as to permit him to challenge the legality of the classification and order made by the draft boards. (7) He contended that if the right to urge this defense was denied him, a construction had been placed upon the Act and Regulations which made them unconstitutional. (7-8) He alleged that they were void because they constitute a bill of attainder, contrary to clause 3 in Section 9 of Article I of the Constitution of the United States; surrender the judicial powers to the draft board, contrary to Article III of the Constitution; deny the right to a judicial trial and the right to prove innocence and no duty under the Act, contrary to the due

process clause of the Fifth Amendment; deny the right of a jury trial and the right to have the jury determine guilt or innocence, contrary to the Constitution and the Sixth Amendment; permit conviction without evidence or guilt and upon hearsay evidence and deny right to benefit of counsel before the draft boards where liability is determined under the Act, contrary to the Fifth and Sixth Amendments. (7-8) The trial court by a written opinion held that acceptance by the armed forces upon a physical examination did not complete the administrative process and petitioner had not exhausted his administrative remedies until he had submitted to induction pursuant to the order. (9-11) The court overruled the motion to quash. (12)

At the close of the evidence petitioner moved for a directed verdict on the grounds that the undisputed evidence showed that the draft board order was void because he was a minister of religion exempt from all training and service and that the boards had no authority to classify him as liable for training and service or order him to report. Each reason asserted in the motion to quash was reiterated in the motion for directed verdict. (40-43) The motion was denied with exception to petitioner. (43)

Counsel for the Government in his summation to the jury stated that petitioner's only remedy to challenge the order was to submit to induction and thereafter apply for a writ of habeas corpus. (55) Exception was allowed to this statement. (55) The court charged the jury that the classification was binding upon petitioner, the court and the jury; that petitioner could not challenge the same on the ground that he was exempt as a minister; and that his failure to appear and submit to induction was a willful violation of the Act. (56-61) Petitioner objected to the court's charge because he had exhausted his administrative remedies and was in a position to challenge the classification and order on which the indictment was based, and that the court's charge to the jury denied him his right to

defend on the ground that he had no duty because exempt as a minister, and instructed the jury to find him guilty, contrary to the Constitution, the Act and the Regulations. (61-65)

Petitioner's requested charges urging that the classification and the order thereon were illegal and void were refused, with exception to petitioner. (61, 67-97) The requests, in the terms of the Act and Regulations, defined what constitute a regular or duly ordained minister of religion. (67-69, 73-78, 91-93) Also the requests stated the duties of the draft boards in considering the ministerial status of Jehovah's witnesses under the Act and Regulations as declared by the Director of Selective Service in Opinion No. 14. (70-73, 78-84, 86-87) The court was requested to instruct the jury that if the jury found that the undisputed evidence before the draft boards showed that petitioner was a minister of religion and of Jehovah's witnesses and there was no substantial evidence that he was not such minister as claimed, the jury could find that the draft boards acted in excess of authority, without jurisdiction, contrary to law, without support of substantial evidence, contrary to the undisputed evidence, contrary to the Constitution, the Act and Regulations, and arbitrarily and capriciously, thereby rendering a verdict of "not guilty" if they so found. (75-76, 84, 87-91) Petitioner also requested the court to charge that the jury could consider his good-faith belief that he was exempt from all training and service, and that he had exhausted his remedies under the Act, in determining whether or not he willfully and knowingly refused to perform a duty required of him under the Act. (93-95) Petitioner excepted to the court's charge as a whole for failure to charge as requested in said requested instructions. (65, 67-97)

SPECIFICATION OF ERRORS

Petitioner relies upon every one of his assignments of error as grounds for a reversal of the conviction.

Reasons Relied On for Allowance of Writ

The sole difference between the issues in this case and those in *Rinko v. United States* (see companion petition) is that while Flakowicz completed the preinduction physical examination, he did not report at the induction station as did Rinko. This difference, however, is not material upon the point of completion of the administrative remedies because acceptance upon a preinduction physical examination constitutes a completion of the selective process. Although Flakowicz, like Falbo,* was indicted for failure to report for induction, he had nevertheless, *prior* to that indictment, completed the selective process, thus *timely* exhausting his administrative remedies and thus entitling himself to judicial review of the illegality of the action of the draft boards in defense to the indictment. The reasons stated in the petition for writ of certiorari in behalf of Rinko (pp. 17-23) as to why the petition should be granted are applicable here. For the sake of brevity they are referred to here as though copied at length herein.

* *Falbo v. United States*, 320 U. S. 549.

WHEREFORE your petitioner prays that this Court issue a writ of certiorari to the Circuit Court of Appeals for the Second Circuit directing such court to certify to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the judgment of the said Circuit Court of Appeals, affirming the judgment of conviction entered by the District Court be here set aside and petitioner dismissed from custody or that, in the alternative, the judgment be reversed and the cause remanded for a new trial not inconsistent with this Court's opinion; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper in the circumstances.

STANLEY JOHN FLAKOWICZ, *Petitioner*

By HAYDEN C. COVINGTON

Counsel for Petitioner

SUPPORTING BRIEF

For a statement showing the opinions of the courts below, the basis on which the jurisdiction of this Court is claimed, the questions presented, the history of the action, how the issues were raised, the evidence received and rejected and the assignments of error relied upon, reference is here made to the foregoing petition for writ of certiorari.

ARGUMENT

Congress amended the Selective Training and Service Act of 1940 by providing that no person may be ordered to report for induction until his acceptability is determined by a preinduction physical examination and that the board must issue to the registrant a certificate of fitness showing whether or not he is acceptable. (U. S. C. Title 50, Appendix, Sec. 304 (a); December 5, 1943, ch. 342, sec. 5, 57 Stat. 599). (Cf. 89 Cong. Rec. 8079 for October 5, 1943) Section 3 (a) of the Act as originally passed provided that no person should be inducted until he is acceptable to the land or naval forces. On January 10, 1944, pursuant to the Congressional mandate, the Selective Service Regulations were amended providing for a preinduction physical examination and the issuance of a certificate of fitness. (Regs. 629.1-629.41).

Since Flakowicz had been determined acceptable upon a preinduction physical examination only thirty days before he was to report for induction there would not have been an additional examination to determine his acceptability upon reporting for induction. There was no chance of Flakowicz' being rejected at the induction station had he reported. The armed forces accept the results of a preinduction physical examination within 90 days of the induction date. It is only when induction will occur more than 90 days from the date of the preinduction physical examina-

tion that the army will not accept the results.* In such case a new preinduction physical examination is given when the registrant reports for induction. Here, presumably Flakowicz would have been accepted upon reporting at the induction station had he reported as ordered by the draft board.

Although Flakowicz did not go as far as Rinko, he nevertheless completed the selective process upon being accepted by the armed forces when he underwent the preinduction physical examination. This exhausted his administrative remedies insofar as his right to judicial review of the illegality of the order to report for induction in defense to the indictment is concerned.

The promulgation of the amendment to the Selective Service Regulations pursuant to the Act of Congress providing for the determination of acceptability, prior to the issuance of the order to report for induction removed Flakowicz from the blight of the rule announced in the *Falbo* case. The amendment providing for acceptance upon a preinduction examination had the effect of recalling the *Falbo* decision which rule cannot now be considered as *stare decisis* for cases involving failure to report for induction under the amended regulations. The decision in the *Falbo* case was limited to the narrow question presented, namely, whether a person who had not completed the last step in the selective process could question the illegality of the administrative order commanding him to take the last step in the selective process. It did not hold that one who had completed the selective process could not attack

* Section 629.1 of the Regulations reads: "(b) The armed forces will not accept the results of a preinduction physical examination after 90 days. Therefore, when a registrant's induction will shortly occur and it appears that the date fixed for his induction will be more than 90 days after the date of his preinduction physical examination, he will be given a new preinduction physical examination before he is ordered to report for induction unless the Director of Selective Service or the State Director of Selective Service directs otherwise." This regulation, now superseded, was in effect at the time petitioner was ordered to report for induction. See amendment No. 20, January 10, 1944.

the indictment on the grounds that the administrative order was void because illegal. The fact that Flakowicz was charged with failure to report for induction is the same charge that was made against Falbo does not make the *Falbo* decision applicable. When one has exhausted his administrative remedies by completing the selective process he may challenge the validity of the administrative order, regardless of whether it be considered an order to submit to induction or an order to report for induction.

The nature of the order upon which the indictment is based does not determine whether it can be challenged as illegal. The criterion for determining the availability of judicial review is whether the administrative remedies have been exhausted. Viewed in this light, there is as much difference between this case and the *Falbo* case as there is between day and night.

Reference is here made to the arguments appearing in the supporting brief incorporated in the petition for writ of certiorari filed in behalf of Alex Rinko (pp. 25 to 37), which is made a part hereof as though copied at length herein. If the *Rinko* case is found to present a substantial question which should be decided by this court so as to allow the granting of the writ of certiorari then inasmuch as this *Flakowicz* case presents the same question upon substantially the same facts the writ of certiorari should also be granted in *this* case.

"The whole collectivist tendency seems to be toward underrating or forgetting the safeguards in bills of rights that had to be fought for in their day and that still are worth fighting for. I have had to deal with cases that made my blood boil and yet seemed to create no feeling in the public or even in most of my brethren. We have been comfortable so long that we are apt to take it for granted that everything will be all right without our taking any trouble. All of which is but a paraphrase of eternal vigilance is the price of freedom—and I would fain add, to the labor men, eternal hard work is the price of a living."—*Justice Holmes*.

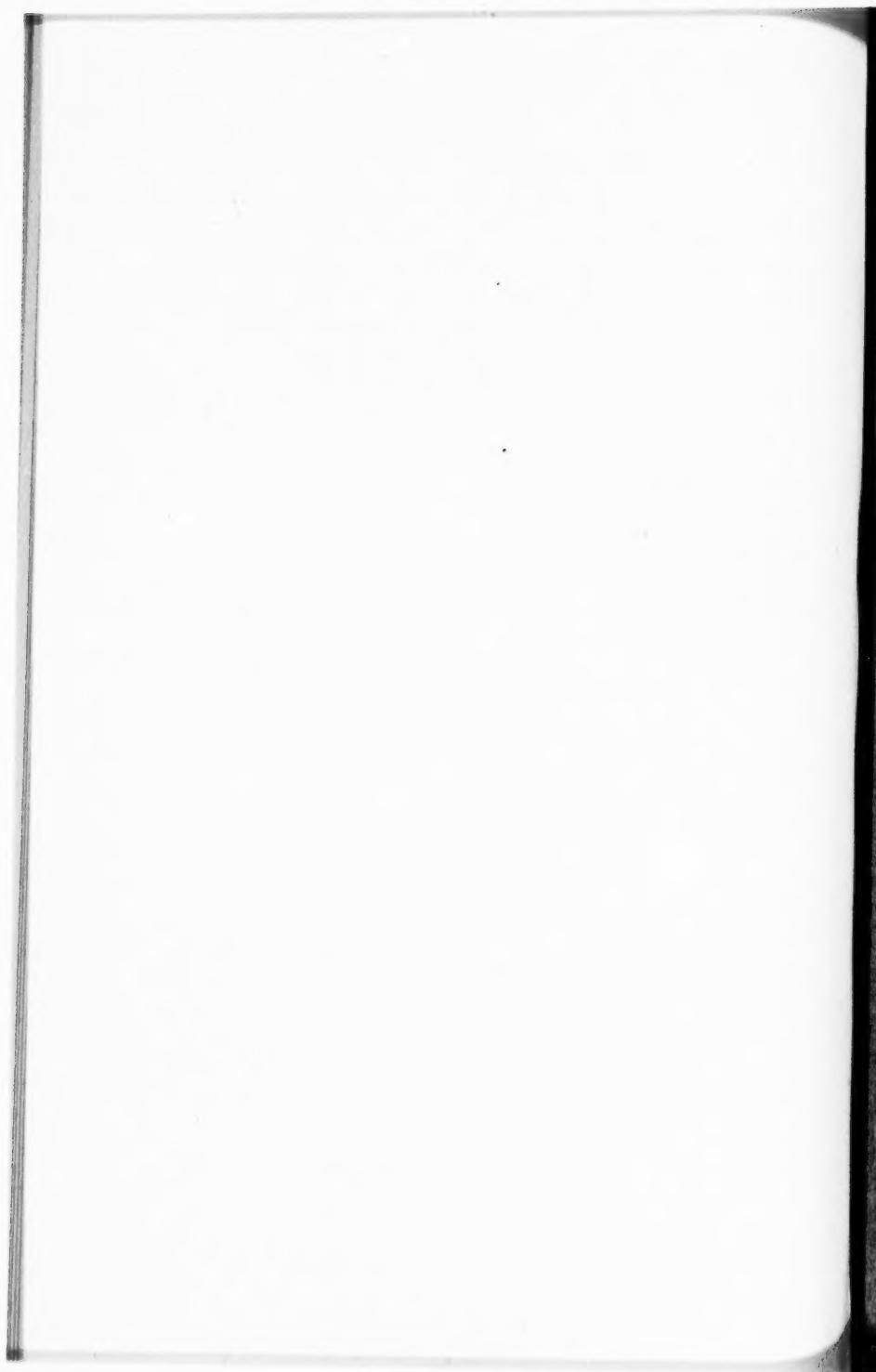
Conclusion

It is submitted that this case is one calling for the exercise by this Court of its supervisory powers under the Judicial Code and the Rules of this Court. To that end the petition for writ of certiorari should be granted so as to correct the assigned errors committed, and the judgment rendered by the Circuit Court of Appeals and by the District Court against petitioner should be reversed and petitioner discharged, or, in the alternative, those judgments should be reversed and a new trial ordered.

Respectfully submitted,

HAYDEN C. COVINGTON

Counsel for Petitioner



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No. 1012

In the Supreme Court of the United States

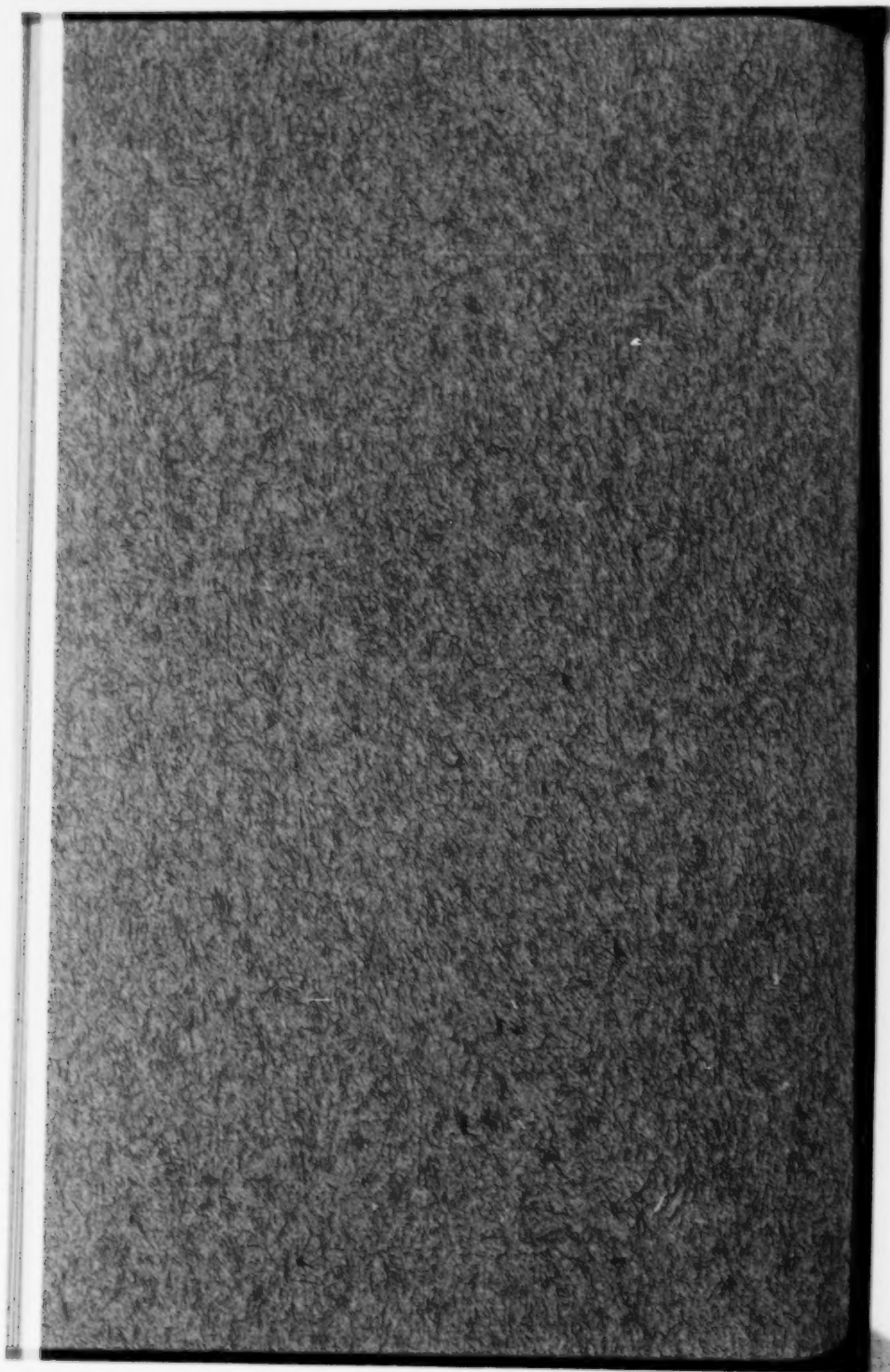
ON PETITION FOR A WRIT OF HABEAS CORPUS

STANLEY JOHN BLANCHARD, PETITIONER,

VS.

THE UNITED STATES OF AMERICA, RESPONDENT.

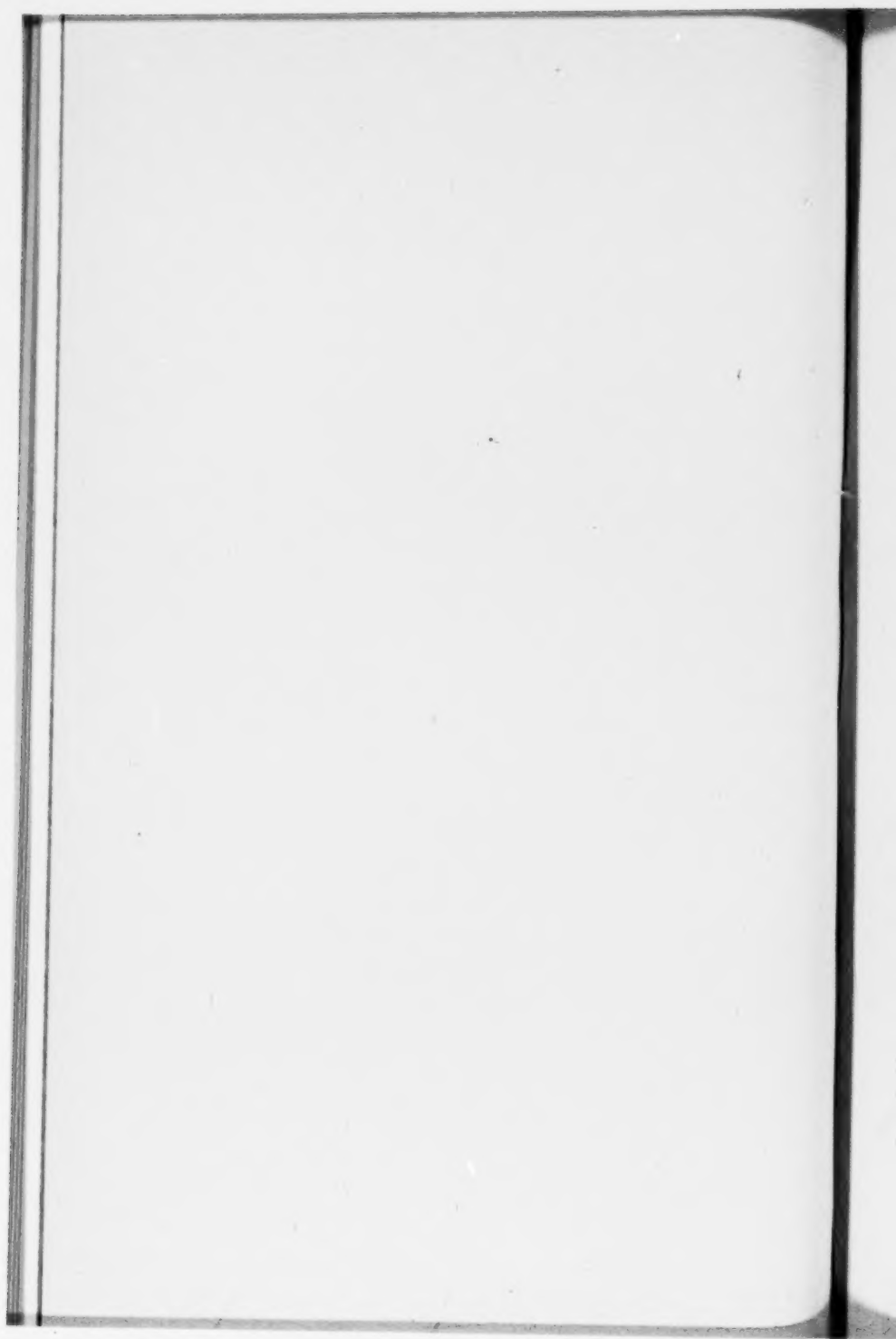
MEMORANDUM FOR THE COURT



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(1)



In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1072

STANLEY JOHN FLAKOWICZ, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On April 18, 1944, petitioner was indicted in the United States District Court for the Eastern District of New York in one count charging that he knowingly failed to report for induction as directed by his local board, in violation of Section 11 of the Selective Training and Service Act of 1940 (50 U. S. C. App. 311) (R. 6). His motion to quash the indictment (R. 7-8) on the grounds that the Act constitutes a bill of attainder, that it surrenders judicial power to the draft board, that it deprives the defendant of his right to a judicial trial and to trial by jury, and that it permits the draft board to determine the guilt of the

defendant, was denied (R. 9-12). Petitioner was convicted after a jury trial (R. 65), and he was sentenced to imprisonment for three years (R. 4-5). Upon appeal to the Circuit Court of Appeals for the Second Circuit the judgment was affirmed (R. 178-180, 183).

The evidence supporting petitioner's conviction may be briefly summarized as follows:

On December 21, 1942, petitioner registered under the Act with Local Board No. 252, Forest Hills, New York (R. 16). He executed his Selective Service questionnaire on January 19, 1943; in that document he stated that he was eighteen years of age; that he had graduated from high school; that his "present occupation" was "ordained minister of the Gospel under the direction of the Watchtower Bible and Tract Society—Publishers for Jehovah's Witnesses"; that he had three and one-half years' experience in this kind of work; that he was a conscientious objector to war; and that he believed that he should be exempted from service as a regularly practicing minister of religion (R. 16, 98-102). On September 27, 1943, petitioner was finally classified 1-A by his local board and upon appeal to the board of appeal that board also classified him 1-A (R. 17). At his request, his case was then reviewed by the National Headquarters of the Selective Service System, where it was concluded that further action was not necessary to avoid an injustice

or in the national interest (R. 137-143). On January 18, 1944, the local board offered petitioner exemption from military service as a conscientious objector, which he declined on the ground that he was entitled to exemption from all service as a minister of religion (R. 144-145). On January 31, 1944, he was given a pre-induction physical examination as directed by his local board, and he was found physically acceptable by the Army (R. 18, 102). He was thereafter ordered to report for induction on March 8, 1944 (R. 19, 103-104). On that date the local board received from him a letter dated March 7, 1944, in which he stated in part: "I owe no duty to such 'Order to Report for Induction' as the Local Board has taken authority not granted it by the Act of Congress in that all ministers are exempt from military service" (R. 19, 104-105). He did not report for induction as directed by his local board (R. 20). He admitted to an F. B. I. agent that he received the order to report for induction, but excused his failure to report on the ground that he was a minister of religion exempt from service under the Act (R. 24).

Petitioner's sole contention in this Court is that the trial court erred in refusing to review his Selective Service classification in his criminal trial for failing to report for induction. The contention rests upon his assumptions (1) that a

selectee who refuses to report for induction but whose final acceptability to the armed forces has been determined is entitled collaterally to challenge his classification in his criminal trial, and (2) that when a selectee has passed his pre-induction physical examination he has been finally accepted for service.

While petitioner seeks to distinguish this case from *Falbo v. United States*, 320 U. S. 549, we believe that it presents the same question as was decided in that case. Except for the fact that Falbo was ordered to report to a Civilian Public Service Camp rather than to an induction center, the facts of the cases are identical. The gist of the argument which petitioner urges was also unsuccessfully pressed upon this Court on petitions for writs of certiorari in *United States ex rel. Lohrberg v. Nicholson*, and *United States ex rel. Falbo v. Kennedy*, Nos. 884 and 885, October Term, 1943, certiorari denied, 322 U. S. 744-745, in which the petitioners had likewise passed their pre-induction physical examinations, but had failed to report to a Civilian Public Service Camp for final acceptance.

Moreover, assuming, *arguendo*, that after a selectee has finally been found acceptable by the Army he may challenge his classification in a subsequent criminal trial for refusal to report for induction, we submit that petitioner's contention must fail, because his acceptability to the Army

has not yet been finally determined. Petitioner was processed under the pre-induction examination system which was inaugurated in January 1944 and which is described in *Billings v. Truesdell*, 321 U. S. 542, 554-555. It differs from the earlier procedure in effect at the time Falbo's case arose whereby registrants classified for military service (but not for Civilian Public Service) were ordered to report for induction prior to examination by the armed forces and, if determined to be acceptable, were immediately inducted. Under the present procedure, if a selectee passes the pre-induction physical examination, he may be ordered up for induction within ninety days without undergoing another one, but when he reports at the induction station he must undergo, *inter alia*, a physical inspection to determine his final acceptability for service. See Army Regulation 615-500, Section 15, issued August 10, 1944;¹ see also p. 5 of our Brief in Opposition in *Rinko v. United States*, No. 1071, which is now pending on petition for certiorari.

That a selectee is not finally found acceptable under this procedure until after he has reported for induction is demonstrated by the fact that 1.5

¹ We are advised by the Selective Service System that while the Army Regulation was issued August 10, 1944, the process which we have described was inaugurated in January 1944, when the Selective Service Regulations were amended to provide for pre-induction physical examinations. Petitioner was ordered to report for induction on March 8, 1944 (R. 19).

percent of the white selectees who reported for induction in January 1945, within ninety days after they passed their pre-induction physical examinations, and 3.7 percent of the colored selectees who reported under similar circumstances were finally found unacceptable by the military authorities and accordingly were not inducted.² In this respect the procedure is the same as that which prevailed in the *Falbo* case for conscientious objectors. In that case this Court held that a registrant classified as a conscientious objector and found upon physical examination to be qualified for service is under the same obligation to obey the subsequent order to report for work of national importance as is the registrant classified for military service and ordered to report for induction into the armed forces, and that in neither case is the order to report the equivalent of final acceptance for service; the selective process is not complete until the registrant is finally accepted for service by the armed forces or a Civilian Public Service Camp (320 U. S., at 553).

Since petitioner failed to report for induction, his acceptability to the Army has not yet been finally determined.³ Accordingly, we submit that

² The figures are from the records of the Selective Service System.

³ The order to report for induction which petitioner received provided in part (R. 103):

"This local board will furnish transportation to an induction station. You will there be examined. and, if accepted

even under the rule for which petitioner contends, he was not entitled collaterally to attack his Selective Service classification in his criminal trial for wilfully failing to report for induction.

For the reasons stated we respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

TOM C. CLARK,
Assistant Attorney General.

ROBERT S. ERDAHL,
IRVING S. SHAPIRO,
Attorneys.

APRIL 1945.

for training and service, you will then be inducted into the land or naval forces.

"Persons reporting to the induction station in some instances may be rejected for physical or other reasons. It is well to keep this in mind in arranging your affairs, to prevent any undue hardship if you are rejected at the induction station. If you are employed, you should advise your employer of this notice and of the possibility that you may not be accepted at the induction station. Your employer can then be prepared to replace you if you are accepted, or to continue your employment if you are rejected."